87-427

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RUSSELL C. EARHART, SR.
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether Petitioner's Fourth Amendment right under the United States Constitution was violated by the trial court's erroneous admission of evidence obtained as a result of an illegal search and seizure, where the search warrant was supported by an improper affidavit of probable cause because the affiant, as revealed at the suppression hearing, demonstrated an utter lack of awareness of sufficient factual evidence and reasonable inferences that could be drawn therefrom to substantiate the averments made in said affidavit?

B. Whether Petitioner's Sixth Amendment right to a fair trial under the United States Constitution was violated when the trial court erred in allowing the Commonwealth to introduce evidence of alleged uncharged criminal acts, namely, the late payment of county real estate tax funds as substantive evidence of Petitioner's guilt in failing to make proper disposition of school district tax funds?

LIST OF ALL PARTIES

The parties to this proceeding are: Russell C. Earhart, Sr., Petitioner herein, by and through his attorney, William C. Costopoulos, Esquire; and the Commonwealth of Pennsylvania, Respondent herein, by and through Richard A. Lewis, Esquire, District Attorney of Dauphin County, Pennsylvania.

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REFERENCE TO OPINIONS BELOW

The Memorandum Opinion of the Superior Court of Pennsylvania dated December 22, 1986, affirming Petitioner's judgment of sentence is reproduced in the Appendix at page A1. The Opinion of The Honorable Warren G. Morgan, Judge of the Court of Common Pleas of Dauphin County, Pennsylvania, dated March 26, 1986, denying Petitioner's post-trial motions is reproduced in the Appendix at page A5.

STATEMENT OF JURISDICTION

This Petition is brought pursuant to 28 U.S.C.A. 1254(1) and Rule 17 of the Rules of this Court. This Petition is from the denial of the Petition for Allowance of Appeal by the Supreme Court of Pennsylvania rendered on July 15, 1987, in the case of Commonwealth of Pennsylvania vs. Russell C. Earhart, Sr., docketed at No. 11 M.D. Allocatur Docket 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 Pa.C.S.A. 3927 Theft by failure to make required dispostion of funds received

"(a) Offense defined. - A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.
(b) Presumptions. - An officer or employee of the government or of a financial institution is presumed:

(1) to know any legal obligation relevant to his criminal liability under this section; and

(2) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts."

72 Pa.C.S.A. 5511.25 Collection and payment over of taxes

"The tax collector shall keep a correct account of all moneys collected by him as taxes under the authority of any duplicate or duplicates in his possession. He shall mark 'paid' on each duplicate at the name of each taxable, the amount of taxes paid, and the date on which payment was made.
"The tax collector shall on or before the tenth day of each month, or oftener, if required by ordinance or resolution of the taxing district, make a true, verified statement, in writing, to the secretary or clerk of the taxing district, or in the case of cities of the third class, to the director of accounts and finance if and as required for all taxes collected for such taxing district during the previous month or period, giving the names of the taxables, the amount collected from each, along with discounts granted or penalties applied, if any, and the total amount of taxes received, discounts granted and penalties applied. The collector shall pay over on or before the tenth day of each month, or oftener, if required by ordinance or resolution of the taxing district, to the treasurer of the taxing district all moneys collected as taxes during the previous month or period and take his receipt for the same.

"The tax collector shall, at any time on demand of any taxing district, exhibit any duplicate in his possession showing the uncollected taxes as of any date."

STATEMENT OF THE CASE

Petitioner, Russell C. Earhart, Sr., who was the duly elected tax collector of Londonderry Township, Dauphin County, Pennsylvania, was arrested in May 1984 and charged with Theft by Failure to Make Required Disposition of Funds Received. (18 Pa.C.S.A. 3927). The complaint alleged that Mr. Earhart, as tax collector, failed to remit monies collected from taxpayers to the Lower Dauphin School District during the period of August 20, 1981, through October 31, 1983. Eventually the informations charged him with 435 separate counts, which represented the number of tax bills paid by the taxpayer but allegedly not remitted by Mr. Earhart in a total amount of $166,349.50.

The Dauphin County Commissioners in August 1983 retained Main Hurdman, an accounting firm, to investigate the collection and remittance of Lower Dauphin School District taxes. The scope of that investigation was then expanded to encompass the collection of county real estate taxes. In October 1983 the Commonwealth was issued a search warrant and seized all business records of Mr. Earhart, which were turned over to Main Hurdman for analysis. Main Hurdman conducted an audit of the school taxes whereby every unpaid taxpayer was sent a letter requesting confirmation that the taxes had in fact not been paid. If a taxpayer had paid, proof of that payment was requested. A list was compiled showing all taxpayers with proof of tax payment to Petitioner but for whom the school district had not received tax monies. The amount of the list was $166,349.50, and hence the charges brought against Mr. Earhart.

Following his preliminary hearing and arraignment, Petitioner filed a Motion to Suppress Evidence on the basis that the probable cause affidavit to the search warrant executed on his business records was fatally defective because the affiant lacked personal knowledge of its averments. This motion preserved the Fourth Amendment issue for potential review by Your Honorable Court. A hearing was held immediately prior to trial before The Honorable Warren G. Morgan, Judge of the Dauphin County Court of Common Pleas at which the affiant admitted the probable cause affidavit rested on the accounting firm's report alone, of which he had no first-hand knowledge. The motion however was denied.

Petitioner's trial by jury before Judge Morgan commenced on February 14, 1985. The Commonwealth at trial developed a theory of the case beyond the informations in attempting to demonstrate by inference that Petitioner, as tax collector, always had a cash flow going through his tax bank account. Because of Petitioner's staggered system of payment to the various taxing agencies, he was able to siphon funds for his personal use. And as long as Petitioner was able to continue the cash flow, the theory continued, his scheme would not be revealed. Only after the seizure of his records and the disruption of that cash flow could Petitioner's failure to make proper disposition of tax funds collected be made known, according to the Commonwealth.

In support of this theory, the Commonwealth relied heavily on the testimony of Louise Milletics of the Dauphin County Treasurer's Office as to the manner in which Petitioner remitted county real estate taxes. The trial court initially refused to permit evidence concerning the collection and payment of the county taxes, apparently recognizing that that evidence was outside the charges against Petitioner, which dealt with school taxes. However, following a second offer, the trial court permitted Ms. Milletics to testify that taxpayers would be notified of delinquent county real estate taxes only to show proof of payment to Petitioner who, when confronted with the discrepancy, would pay the county the taxes with interest and penalty. Additionally, Ms. Millectics and Norma Duttenhoffer of the Dauphin County Tax Claim Bureau were allowed to state that Petitioner, of the other 39 tax collectors in the county, was the only one with the problem of payment. Finally, Ms. Millectics testified that in September 1983 Petitioner made payment of collected county real estate taxes in the amount of $71,199.47 for taxes allegedly collected in February and March 1983, well beyond the due date for remittance.

While none of the above evidence had any substantive relevance to the charges of which Petitioner stood accused, that is, that he failed to remit school taxes, it did substantially prejudice him by creating the appearance of impropriety.

Testifying on his own behalf, Petitioner said that each year the various tax agencies would certify in writing the amount collected and the amount that should have been remitted to those agencies. Never did any of those agencies make a claim

for discrepancies. Further, Petitioner introduced his personal and business tax returns for the years 1980 through 1983, and copies of all his bank statements relating to both the tax accounts and insurance accounts which showed the tax monies collected and subsequent payment to tax agencies. Petitioner also noted that he was a licensed real estate broker and insurance agent for ten or eleven insurance companies, and that he collected insurance premiums and taxes. While generally keeping separate accounts for what were three separate occupations -- tax collector, real estate broker and insurance agent -- Petitioner denied that he failed to turn over any taxes collected to the appropriate agencies. He did acknowledge that his accounts at times contained hundreds of thousands of dollars and, in combination with marital problems, he was at most guilty of "sloppy bookkeeping."

Though the Commonwealth did not show where the school tax funds allegedly collected but not remitted went and its case was based on impeachment of Petitioner through evidence of uncharged late payment of county real estate taxes, Petitioner was found guilty of all counts on February 21, 1985. His timely filed post-trial motions, which preserved the issues raised in this Petition, were denied by Judge Morgan on October 18, 1986. Petitioner was sentenced to a term of imprisonment of three and one-half (3½) to seven (7) years.

Petitioner timely filed a Notice of Appeal with the Superior Court of Pennsylvania, which appeal was denied by an Order and Opinion dated December 22, 1986. He then timely filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which Petition was denied on July 15, 1987.

STAGE IN PROCEEDINGS IN WHICH FEDERAL QUESTIONS RAISED

Petitioner's Fourth Amendment issue was raised by way of a pre-trial Motion to Suppress Evidence and a post-trial motion, both of which the trial court denied. See Judge Morgan's Opinion at p. A5. Petitioner then briefed the issue before the Superior Court of Pennsylvania, which also denied it. See the Memorandum Opinion of the Superior Court of Pennsylvania at p. A1.

Petitioner's Sixth Amendment issue was raised by objections made at trial, which the trial court overruled, and a post-trial motion, which the trial court denied. See Judge Morgan's

Opinion at p. A5. Petitioner then briefed the issue before the Superior Court of Pennsylvania, which also denied it. See the Memorandum Opinion of the Superior Court of Pennsylvania at p. A1.

REASONS FOR ALLOWANCE OF WRIT

A. PETITIONER'S FOURTH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S ERRONEOUS ADMISSION OF EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE, WHERE THE SEARCH WARRANT WAS SUPPORTED BY AN IMPROPER AFFIDAVIT OF PROBABLE CAUSE BECAUSE THE AFFIANT, AS REVEALED AT THE SUPPRESSION HEARING, DEMONSTRATED AN UTTER LACK OF AWARENESS OF SUFFICIENT FACTUAL EVIDENCE AND REASONABLE INFERENCES THAT COULD BE DRAWN THE REFROM TO SUBSTANTIATE THE AVERMENTS IN SAID AFFIDAVIT.

Chief Dauphin County Detective Kenneth Barbush applied for a search warrant to the Honorable William W. Lipsitt of the Dauphin County Court of Common Pleas, which warrant was issued and served at Petitioner's offices on October 7, 1983. That warrant, resulting in the seizure of Petitioner's tax and other business records, was supported by a probable cause affidavit executed by Detective Barbush. Additionally, a four-page summary of the audit conducted by the accounting firm of Main Hurdman, which was retained to investigate Petitioner's tax records, was attached to the warrant application. Petitioner filed a Motion to Suppress Evidence challenging the validity of the probable cause affidavit based on the detective's lack of factual knowledge sufficient to substantiate his oath and affidavit. Indeed, at the suppression hearing, Detective Barbush revealed that he was manifestly unaware of the contents of Main Hurdman's report notwithstanding his swearing to the affidavit of probable cause. The suppression court however denied Petitioner's Motion to Suppress.

Petitioner respectfully submits that the suppression court erred in denying said Motion because the affidavit did not provide a sufficient basis for an independent determination by a neutral judicial officer that probable cause existed and, therefore, Petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution was violated. Petitioner must be granted a new trial.

An affidavit in support of a search warrant must provide a magistrate with sufficient information to persuade a reasonable person that there is probable cause for a search. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, rehearing denied 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983); *Commonwealth v. Minton,* 288 Pa. Super. 381, 432 A.2d 12, 214 (1981). While Petitioner acknowledges that averments contained within an application for a search warrant may be based on heresay, *Franks v. Delaware,* 438, U.S. 154, 98 S.Ct. 2674,57 L.Ed. 2d 667 (1978); *Commonwealth v. Dial,* 445 Pa. 251, 285 A. 2d 125 (1971), suspicion or conjecture on the part of an affiant is insufficient. *Commonwealth v. Mazzochetti,* 299 Pa.Super. 447, 445 A.2d 1214 (1982). And as Your Honorable Court held in *Franks v. Delaware, supra,* an affidavit attached to a warrant presumes that a truthful factual showing exists sufficient to establish probable cause, though the facts recited must be truthful only to the extent "that the information put forth is believed or appropriately accepted by the affiant as true." Id., 438 U.S. at 164-165, 98 S.Ct. at 2680-2681, 57 L.Ed. 2d at 677-678.

For the affiant to accept heresay as truthful and thereby execute an affidavit to that effect, however, presumably he must be acquainted with that heresay information. In the instant case, the heresay relied on was the four-page auditor's report prepared by the firm of Main Hurdman. As the subsequent suppression hearing revealed, the affiant was unable to show knowledge of the most basic facts set forth in that report, not to mention that he demonstrated a total lack of knowledge as to the investigation resulting in that report. This ignorance, in turn, can only mean that the affiant simply affixed the auditor's report to the warrant application and then verified the entire package without bothering to even study it.

The question comes down to what an affiant must do in order to believe or appropriately accept as truthful the heresay information to which he is swearing. *Franks v. Delaware, supra.*

Is an affiant at least required to read the report he is relying on as establishing probable cause for the issuance of a search warrant? Should he go further and study that heresay document to determine its veracity? Or ought an affiant go beyond the four corners of a document, such as the auditor's report here, and actually ascertain what information the report itself is based on.

Petitioner respectfully submits that here the affiant did not even do the minimum required before swearing that, based on heresay, sufficient probable cause existed to seek the issuance of a warrant. That is, the affiant evidently did not even read the auditor's report accordingly to his inability to answer perfunctory questions posed to him relative to that report at the suppression hearing. Assuming the purpose of an affidavit is to provide a sufficient factual basis for an independent determination by a neutral judicial officer that probable cause exists, if the affiant, the person swearing to that hearsay, is unaware of just what factual information that heresay consists, how can he vouch for its truthfulness and then how can a magistrate truly make any independent determination that probable cause indeed exists based on that heresay? To hold otherwise is to reduce the execution of an affidavit by an affiant to a mechanistic formality and the subsequent issuance of a warrant by a magistrate founded thereon to a mere rubber stamp.

Accordingly, Petitioner respectfully submits that the affidavit in support of the warrant used to seize his tax and business records was fatally flawed in violation of the Fourth Amendment to the United States Constitution and, therefore, the suppression court erred in denying his Motion to Suppress the evidence obtained as a result of that search. Petitioner must be granted a new trial.

B. PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT ERRED IN ALLOWING THE COMMONWEALTH TO INTRODUCE EVIDENCE OF ALLEGED UNCHARGED CRIMINAL ACTS, NAMELY, THE LATE PAYMENT OF COUNTY REAL ESTATE TAX FUNDS AS SUBSTANTIVE EVIDENCE OF PETITIONER'S GUILT IN FAILING TO MAKE PROPER DISPOSITION OF SCHOOL DISTRICT TAX FUNDS.

Petitioner was charged with failure to make proper disposition of school district tax monies collected only. At trial, however, the Commonwealth's case consisted primarily of

showing that he did not remit or timely remit county real estate taxes. This evidence was at first refused then admitted by the trial court under the other crimes evidentiary rule to demonstrate that Petitioner's handling of county taxes was part of the whole scheme of failing to properly dispose of the school district tax funds. Petitioner suggests that the Commonwealth actually used the tardy payment of county tax funds as substantive evidence of the crime for which he stood trial, i.e., the improper disposition of school district tax monies, thereby smearing his character before the jury and demonstrating that Petitioner had a propensity to commit the crime charged. And even if admissible as an other crimes exception, the trial court, upon applying the balancing test, should have found that the prejudicial impact of the county tax evidence outweighed any probative value it may have had, thus rendering it inadmissible.

The Federal and Pennsylvania standards regarding the admissibility of evidence of other crimes are essentially the same. Petitioner respectfully submits, however, that the state standard in the instant case was misapplied by the trial court in violation of his Sixth Amendment right to a fair trial, and that this misapplication constitutes an issue of Federal import.

The Supreme Court of Pennsylvania has held that "[i]t is black letter law that evidence of one crime is inadmissible against a defendent being tried for another crime because the fact of the commission of one offense is not proof of the commission of another." (citation omitted). *Commonwealth v. Peterson,* 453 Pa. 187, 307 A. 2d 264 (1973). Your Honorable Court has ruled similarly. *Michelson v. United States,* 355 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 2d 168 (1949); *United States v. Daniels,* 770 F. 2d 1111 (C.A.D.C.) (1985). Evidence of another crime, however, may be admissible when "it tends to prove (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme, plan, or design involving incidents so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the persons charged with the commission of the crime on trial . . . [or] (6) where the crime was committed to conceal the commission of the crime on trial or to escape its consequences." (citation omitted). *Commonwealth v. Terrell,* 234 Pa. Super. 325, 339 A.2d 112 (1975); *United States v. Nabors,* 761 F.2d 465, cert.denied 106 S.Ct. 148, 88 L.Ed.2d 123, rehearing denied 106 S.Ct. 840, 88 L.Ed. 2d 810 (C.A.8 Ark.) (1985).

This exception is expressly predicted on a balancing test, for "even if the evidence is arguably admissible under [an] exception, the court must balance the need for the evidence against its potential prejudice in order to determine its admissibility." (citation omitted). *Commonwealth v. Mitchell,* 314 Pa.Super. 364, 460 A.2d 1182 (1983); *United States v. Schwartz,* 790 F.2d 1059 (C.A. 3 Pa.) (1986); *United States v. Hans,* 738 F.2d 1059 (C.A. 3 Pa.) (1984). The trial court here abused its discretion.

In Petitioner's case the Commonwealth, of course, argued that proof of tardy payment of the county real estate taxes met almost every one of the other crimes requirements. It showed "an absence of mistake or accident," a "common scheme, plan, or design, " and an attempt "to conceal the commission of the crime on trial or escape its consequences." Interestingly enough, the trial court initially declined to admit into evidence the uncharged crime of failing to remit county real estate taxes at the time and place required by the "Local Tax Collection Law" (72 Pa.C.S.A. 5511.25) as if recognizing its inadmissibility, but then reversed itself and allowed admission of said evidence.

Much of the Commonwealth's case-in-chief consisted of the testimony of three Dauphin County employees as to the county real estate taxes. Controller Tom Washic was permitted to testify that Petitioner, when he came to the courthouse with a certain monthly payment, admitted co-mingling tax funds with insurance funds, that is, sometimes Petitioner would write a check from his insurance account to the tax collector's account. And Mr. Washic also testified that Petitioner was making that particular late payment of county real estate tax funds *after* the start of the audit on his books. As outlined above, Louise Milletics of the Treasurer's Office said that Petitioner would make late payment to the county of real estate taxes, with interest and penalty, only after confronted with a discrepancy and that, for example, Petitioner made late remittances in September 1983 of over $71,000 in taxes allegedly collected in February and March 1983. And Norma Duttenhoffer, head of the Tax Claim Bureau, was allowed to state that Petitioner, of the 40 county real estate tax collectors, was the only one making late remittances.

Petitioner, however, was charged in the information with intentionally dealing with the school district taxes collected

as his own and failing to make the required payment or disposition of same (18 Pa.C.S.A. 3927). Yet the bulk of the evidence presented at trial against Petitioner centered around the uncharged criminal activity of failing to pay taxes at the time and place required by the "Local Tax Collection Law" (72 Pa.C.S.A. 5511.25). Though supposedly admitted to enable the jury to understand the Commonwealth's complex theory of the case, namely, that Petitioner siphoned county taxes to remit school taxes while retaining the actual school taxes collected for his own use, in fact that evidence comprised the Commonwealth's case and was essential as substantial evidence in obtaining the conviction. If the Commonwealth had the evidence to prosecute Petitioner on the county taxes only, it should have tried him on that charge rather than using evidence of one discrete criminal act as evidence of another.

Assuming, *arguendo,* that the other crimes evidence was admissible, that its prejudicial impact outweighed its probative value should have prevented the testimony of the late remittance of county real estate tax monies from coming in ultimately. Consider first that Petitioner stood accused of improper disposition of tax funds collected. Then consider that the Commonwealth's evidence of that charge consisted precisely of the improper disposition of tax funds collected -- tax funds of a different kind (real estate, not school) and to a different taxing authority (county, not school district). How could a jury possibly perform the mental calculation necessary to consider evidence of one *not* as evidence of the other, but as merely "background information?"

Moreover, what is particularly prejudicial here is the extensive nature of the other crimes evidence adduced relative to the Commonwealth's case as a whole. This was not a brief passing reference to an uncharged offense or a prior conviction. Rather, there was detailed, exhaustive testimony given by several prominent county officials replete with much documentation in the form of numerous exhibits. Indeed, Petitioner was effectively tried for an offense with which he was not charged, but which was nearly identical to the actual crime of which he was accused. Without question the prejudicial impact on Petitioner's jury of several days of trial testimony concerning this other crimes evidence greatly outweighed its probative value in explaining to the jury, by way of background information, the theory of the case which the Commonwealth self-servingly characterized as "complex" in order to gain its admission.

Finally, the prosecutor argued in his closing speech to the jury that Petitioner's pattern of criminality extended as far back as 1974, when he first was elected tax collector. No evidence was presented to suggest that Petitioner committed any offense or impropriety prior to 1981, however, as the trial court recognized in issuing a cautionary instruction to the jury. This did not cure the prejudice inuring to Petitioner. For the prosecutor's improper comments reinforced the real strategy of the Commonwealth: to convict Petitioner on the basis of uncharged offenses allegedly perpetrated over the years, and thus Petitioner was further prejudiced.

Accordingly, because the trial court erred in applying the Pennsylvania standard for admitting evidence of other crimes against Petitioner, which standard is the same as the Federal, Petitioner was deprived of his right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution. A new trial ought to be granted Petitioner.

WHEREFORE, Petitioner, Russell C. Earhart, Sr., based on the foregoing, respectfully requests that Your Honorable Court grant his Petition for Writ of Certiorari. In the event that said Petition is granted, Petitioner respectfully requests that Your Honorable Court reverse the judgement of sentence imposed by the court below and grant him a new trial.

RESPECTFULLY SUBMITTED:

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APPENDIX
MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

RUSSELL C. EARHART, SR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 270 Harrisburg, 1986

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Dauphin County, No. 1050 C.D. 1984.

BEFORE: WICKERSHAM, ROWLEY, and TAMILIA, JJ.

MEMORANDUM: FILED: DECEMBER 22, 1986

Appellant, a tax collector, was found guilty by a jury of 435 counts of theft by failure to make required disposition of funds received[1] for his failure to promptly remit $166,349.50 in taxes to the Lower Dauphin School District. As the duly elected tax collector for Londonderry Township in Dauphin County, appellant was required to collect real estate taxes owed to the county and to collect both real estate taxes and personal taxes owed to the school district. The Commonwealth's theory at trial was that appellant used recently received tax payments owed to one taxing authority to pay the overdue taxes owed to the other taxing authority for which he had previously received payment but had failed to remit. This procedure enabled appellant to convert the funds to his own use in the interim.

Appellant was sentenced to 3½ to 7 years imprisonment and was ordered to pay restitution. This appeal follows in which he raises six issues for review. We affirm.

The information charged appellant with the misuse of school district taxes only. He first argues that the trial court erred in allowing evidence at trial concerning his dealings with county real estate taxes because it constituted evidence of other crimes not charged in the information. The Commonwealth responds that the jury was never presented with the possibility of criminal sanctions for the failure to promptly remit the county taxes; that the evidence was admissible as evidence of an absence of mistake or accident,a common scheme, plan, design or modus operandi, and that the evidence was necessary to show how the crimes occurred.

The trial court found that the evidence was properly presented by the Commonwealth to establish how the thefts occurred. Trial court's op. at 8 - 10. We agree and find no error in the admission of the evidence concerning the county taxes. *See Commonwealth v. Robinson,* 316 Pa. Super. 152, 462 A. 2d 840 (1983) (evidence of other crimes is admissible if it concerns part of the same transaction and is a natural development of facts surrounding the offenses with which defendant is charged). Without admission of the evidence as to appellant's dealings with the county taxes, the jury would not be able to understand how he managed to ultimately remit the taxes to the appropriate government body, albeit late. Moreover, the trial court correctly charged the jury not to infer appellant's guilt because of his failure to make timely payments to the county.

Appellant next argues that the trial court erred in denying his pre-trial motion to suppress evidence in the form of tax records seized from his office pursuant to a search warrant. He submits that the warrant violated the Fourth Amendment of the United States Constitution because the affiant, a county detective, provided insufficient factual evidence and reasonable inferences from which probable cause could be established to justify issuance of the search warrant.

Both the trial court and the Commonwealth interpreted appellant's argument as challenging the probable cause section on the warrant because it was based on an accounting firm's report of appellant's activities and not on the affiant's own independent, objective knowledge and evidence. The trial court rejected this argument since the probable cause requirement for issuance of a search warrant may be based on hearsay evidence. The court noted that the report was prepared by a reputable accounting firm specifically employed to perform an

examination of appellant's tax records. Thus, the affiant provided a substantial basis for concluding that probable cause existed to justify issuance of the search warrant. We agree. See *Commonwealth v. Jones*, 506 Pa. 262, 484 A.2d 1383 (1984) (information offered to demonstrate probable cause for issuance of search warrant must be viewed in a common sense, nontechnical, ungrudging and positive manner).

In his third argument, appellant claims that the trial court erred by allowing the prosecutor to argue in closing that appellant made untimely tax remittances prior to 1981 when the evidence offered at trial was limited to 1981 through 1983. The trial court conceded that there was no evidence to suggest any improprieties on the part of appellant prior to 1981, but concluded that any possibility of prejudice was eradicated by the court's instructions to the jury: "Counsel may not argue to you matters that are not in evidence or inferences that cannot reasonably be drawn from the evidence. With that statement, the jury can form its own conclusions . . . [T]here is no evidence in this record of improprieties prior to the dates at issue here." R.R. Vol. 4, pp. 648, 651. We are satisfied, after our review of the record, that the trial court has adequately addressed and correctly decided the matter.

In his fourth argument, issue D, appellant raises the same claim but argues that a mistrial should have been granted as a result of the prosecutor's references to the earlier years. Our review of the record reveals that a motion for a mistrial was not made by appellant concerning the prosecutor's comments. Therefore, he has failed to properly preserve the issue for review and we may not consider it. *See* R.R. Vol. 4, pp. 647 - 652. Appellant also argues in issue D that a blackboard upon which the prosecutor wrote the dates of the years "was not reduced to protect the record in the case." Appellant's brief at 17. Because this issue was not raised in the statement of issues of suggested thereby, we may not consider this claim. Pa.R.A.P. 2116(a).

Appellant next contends that his motion for a mistrial should have been granted when 1) the Commonwealth attempted to make references to an arson and the burning of appellant's business, and 2) a Commonwealth witness indicated that insurance claims had been paid by an insurance company. Appellant submits that the foregoing events violated the

statutory provision against examination of a criminal defendant as to other offenses, 42 Pa.C.S. §5918. We have reviewed the record and have accorded due consideration to the arguments advanced by appellant. Judge Morgan, in his opinion of March 26, 1986, has adequately discussed and properly disposed of the issues. *See* trial court's op. at 10 - 13.

Finally, appellant argues that the Commonwealth's evidence was inconsistent and was not sufficient to overcome the presumption of innocence. After having reviewed the issue under the applicable standard of review, *Commonwealth v. Taylor*, 324 Pa. Super. 420, 471 A.2d 1228 (1984), we conclude that it has been adequately discussed and properly disposed of by Judge Morgan in his opinion at 5 - 7. In the last paragraph of this argument, appellant also takes issue with the nature of the jury's deliberations. Because this contention was not raised in his statement of the issues or suggested thereby, we may not consider it. Pa.R.A.P. 2116(a).

Judgment of sentence affirmed.

OPINION OF THE HONORABLE WARREN G. MORGAN, JUDGE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
VS.
RUSSELL C. EARHART, SR.

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 1050 CRIMINAL DOCKET 1984

OPINION

Defendant, a tax collector, was charged with 435 counts of theft by failure to make required disposition of funds received. The counts were consolidated and a jury found him guilty at the conclusion of the February 14-21, 1985, trial. He filed motions for new trial and in arrest of judgment challenging (1) the court's denial of pre-trial motions to suppress evidence seized from an alleged illegal search and seizure; (2) the admission at trial of evidence concerning county real estate taxes; (3) the court's denial of two motions for mistrial; (4) the district attorney's use during closing argument of a blackboard which contained information differing from that produced at trial; and (5) the sufficiency of the evidence to overcome the presumption of innocence. Defendant's motions were denied on October 18, 1985, and a presentence report was ordered.

On December 5, 1985, defendant filed a motion for new trial based on after discovered evidence. That motion involved records belonging to the defendant which the Commomwealth inadvertently failed to return to him prior to trial. This motion, too, does not merit relief and it is denied.

Defendant was the elected tax collector for Londonderry Township in Dauphin County, a position which required him to collect both county real estate taxes and Lower Dauphin

School District real estate/personal taxes. In August of 1983, the Dauphin County Commissioners employed the accounting firm of Main Hurdman to conduct an audit into defendant's county tax accounts to see if there was any pattern of late remittance or non-payment of the county taxes collected. Their audit did reveal a pattern of late payment and the firm therefore recommended that the school tax records be examined in order to see the whole picture. Such an examination was undertaken, with Main Hurdman requesting confirmation from taxpayers listed as having unpaid taxes as to the status of those taxes. All taxpayers who alleged that their taxes had been paid were required to furnish proof to that effect. A Main Hurdman accountant then prepared a list of individuals from whom the school district had not received payment but who had furnished proof that they had in fact made payment to defendant. This list, which involved claims from 1981-83, formed the basis of the 435-count, $166,349.50 criminal complaint filed against the defendant.

At trial the Commonwealth presented detailed evidence as to the overall tax structure and calendar, showing when billings were made and payments collected. This evidence was vital to the Commonwealth's case, for on the face of it there did not appear to be any shortage. Defendant had been given a clean bill of fiscal health at the end of each year, that he had paid all that was due to the proper taxing authority, i.e., the school district and the county (N.T. 101, 123-26, 139-40). Where, then, was the shortage and how did it occur? The Commonwealth's theory was that the defendant used recently-received tax receipts owed to one taxing authority to pay the overdue taxes owed to the other for which he had previously received monies from taxpayers but had failed to remit. To support this theory the Commonwealth presented testimony as to the various taxes collected by defendant and their staggered time frames. County real estate taxes were sent to taxpayers on February 1 of each year (N.T. 164). Taxpayers who paid in February and March received a 2% discount (N.T. 164), in June and July a 5% penalty was imposed and after July a 10% penalty was imposed (N.T. 164). On December 15 unpaid taxes were deemed delinquent and were turned over to the Tax Claim Office (N.T. 165).

Defendant also collected school district personal and real estate taxes, which were sent out to taxpayers on July 1 of each

year (N.T. 85). The 2% discount applied to payments made in July and August (N.T. 87), in September and October the face amount applied and in November/December a 10% penalty was affixed (N.T. 87). School district taxes not paid to the tax collector by April 15 (for real estate taxes) or December 31 (for personal taxes) were termed delinquent and were turned over to the Tax Claim Bureau (N.T. 87-88).

The Commonwealth presented evidence that although defendant received tax monies from taxpayers in the early, "discount" period of the billing those taxes were not turned over to the district for several months and that when they were turned over the penalty was paid but not by the taxpayers. (N.T. 139). The Commonwealth also established that the penalty amounts for defendant's township were $5,000-$10,000 greater than those in any other township (N.T. 138); that the amount of money turned in by defendant in the early, "discount" period of the billing calendar was significantly less than that collected in other townships (N.T. 169-173), and that defendant's salary as a tax collector approximated $14,000-$15,000 (N.T. 140). The Commonwealth also presented evidence (1) that the School District records had been closely examined to insure that the tax monies listed in the information had not been received by the school district; (2) that defendant wrote tax checks to the Harrisburg Credit Bureau from several different bank accounts, not just his tax account; and (3) that the defendant had admitted comingling tax funds with other funds in his various checking accounts.

The Commonwealth introduced into evidence copies of the cancelled checks or receipted tax bills for the individuals on the Main Hurdman list. The defendant stipulated that those payments had in fact been received by him, but argued that all money due the school district had been paid to the school district. Citing distractions caused by marital problems and the juggling of multiple jobs, the defendant said that his only crime was one of sloppy bookkeeping.

Initially we dispose of defendant's argument that the Commonwealth's evidence was inconsistent and insufficient to overcome the presumption of innocence -- in short, a challenge to the sufficiency of the evidence. In resolving a sufficiency question the court must evaluate the evidence in the light most favorable to the Commonwealth and it is entitled to all

reasonable inferences arising from that evidence. The effect of such a challenge is to admit all the facts which the Commonwealth's evidence tends to prove. *Commonwealth v. Meadows,* 471 Pa. 201, 369 A. 2d 1266 (1977).

Under 18 Pa. Cons. Stat. Ann. §3927(a) (Purdon 1985 supp.), a person who obtains property subject to a known legal obligation to make specified payments or other disposition is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. Under subsection (b) a government employee or officer is presumed to have dealt with the property as his own "if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts." The four elements of the crime, then, are (1) the receipt of property of another, (2) an agreement or known legal obligation upon receipt to make specific disposition of the property, (3) the intentional use of the property received as the recipient's own, and (4) the failure to make the required disposition. *Commonwealth v. Austin,* 258 Pa. Super. 461, 393 A. 2d 36 (1978).

In the present case defendant stipulated that he had received the monies charged in the 435-count information and it cannot be disputed that as the elected tax collector he had a known legal obligation to make a specific disposition of the funds received. Testimony at trial established that he had dealt with the property as his own in that the audit conducted by Main Hurdman revealed a shortage. And testimony at trial also established that the township had not received the funds associated with the 435 counts.

Defendant argues that there was no evidence as to what had been done with the missing funds; however, such evidence is not required to sustain a conviction. He also argues that all monies due on various taxes had been paid to the school district; that no shortage existed; and that the Commonwealth, recognizing this, switched its theory and attempted to convict him for failing to make his payments timely. This argument ignores the basis of Commonwealth's case, which was that although defendant turned over tax monies to the governing authority, they were turned over late and with the use of funds received on more recently-due taxes. Thus all taxes had not been paid; there was a shortage; and the Commonwealth's introduction of evidence of late payments was not an attempt to convict him of that offense but was simply intended to fully explain

to the jury what had happened. The evidence was easily sufficient to sustain the conviction and defendant's argument here is dismissed.[1]

Defendant's next argument challenges the validity of a search warrant which resulted in the seizure of records from his office. On October 6, 1983, upon the completion of the Main Hurdman audit of county/school district tax collections and based upon a report issued by that firm detailing the findings of that audit, a criminal investigator for Dauphin County applied for and received a warrant authorizing the seizure of "[a]ll records related to the office of tax collector of Londonderry Township [, a]ll business and personal records of Russell C. Earhart ... for the calendar year 1982 and 1983 to date." Defendant challenges the validity of the warrant ultimately issued because the investigator based his probable cause affidavit in the firm's report and not on his own independent, objective knowledge and evidence.

It is by now beyond dispute that probable cause for a search warrant may be properly based on hearsay. *Commonwealth v. Kaschik*, 235 Pa. Super. 388, 344 A. 2d 519 (1975). The task of the issuing authority in examining the allegations of probable cause is

> ... simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois V. Gates, 462 U.S. 213, 238 (1983). And the duty of the reviewing court is "simply to ensure that the [issuing authority] had a 'substantial basis for ... conclud[ing]' that probable cause existed." Id. at 238-39 (quoting *Jones v. United States*, 362 U.S. 271 (1983)).

1. Defendant also argues that the jury was asked to deliberate at 4:30 in the afternoon on 435 counts and was unable to give sufficient consideration to the evidence. We disagree. The counts were consolidated and little individual evidence was presented as to each count. Sufficient deliberations did not require several hours.

In the present case probable cause was based upon an audit conducted by a reputable firm well known in the accounting field, a firm that had been specifically employed to perform the examination which formed the basis of the information. The bottom line of that examination was that significant sums of money had not been remitted by defendant to the proper governing authority. We do not hesitate in finding that the issuing authority had a substantial basis to give credence to the Main Hurdman report and to conclude that evidence of the crime would probably be found in the records at defendant's office. Defendant's argument here is dismissed.

Defendant's next argument is that the court erred in admitting at trial testimony concerning his late payment of county real estate taxes. Defendant argues that this constituted evidence of separate criminal activity and was thus prejudicial and inadmissible at trial.

It is true that evidence of one crime is inadmissible against a defendant on trial for another crime, for proof of the commission of one offense is not proof of the commission of the other. *Commonwealth v. Morris,* 493 Pa. 164, 425 A.2d 715 (1981); *Commmonwealth v. Davis,* 331 Pa. Super. 285, 480 A.2d 1035 (1984). However, there are exceptions to this general rule. For example, such evidence is admissible if it concerns part of the same transaction and is a natural development of the facts surrounding the offenses for which he is being tried. *Commonwealth v. Robinson,* 316 Pa. Super. 152, 462 A.2d 840 1983.

In the present case the defendant contended that all monies received on the 435 counts had been deposited into his tax collector's checking account and that all monies in that account had been remitted to the various taxing authorities. This contention was basically uncontested by the Commonwealth, which had the task of explaining to the jury where the theft was. The explanation was that the monies received on the 435 counts were remitted to the taxing authorities in payment of taxes which had been due in an earlier period. Testimony concerning the staggered time frames of county/school district tax collections was properly presented as part of that explanation, as was testimony as to defendant's pattern of tardy payment, for it was the result of the natural development of the facts surrounding the offenses for which he was charged and was necessary to fully explain to the jury the mechanics of the theft

which with defendant had been charged. Defendant's argument here is dismissed.[2]

Defendant's next argument challenges the court's refusal to grant defense motions for mistrial. During the trial defendant made repeated references to the records which had been seized by authorities pursuant to the search warrant; he maintained that those records had not been returned but that records not belonging to him had been. When questioned by the District Attorney concerning the records that had been returned to him he stated that they had been taken out of his office during a fire that had occurred there shortly before trial began. The District Attorney then asked: "Do you know whether the fire marshall has determined the cause and origin of that fire? (N.T. 573). At that point defense counsel objected and at the sidebar conference that followed moved for mistrial. That motion was denied.

Defendant argues that our denial was error and cities *Commonwealth v. Gray*, 297 Pa. Super. 123, 443 A.2d 330 (1982) in support. In that case the prosecuting attorney during a burglary trial questioned the defendant concerning his prior guilty plea to a theft charge. The Superior Court cited 42 Pa. Cons. Stat. Ann. §5918 (Purdon)[3] and stated that that provision had to be followed to the letter. The case was accordingly remanded.

2. We also note that the jury was specifically charged not to infer his guilt of the crime charged because of evidence of his failure to make timely payments to the county. See N.T. 658-59.

3. That section provides:

> No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation unless:
>
> (1) he shall have at such trial, personally or by counsel, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or
>
> (2) he shall have testified at such trial against a codefendant, charged with the same offense.

In the present case the question put to the defendant concerning the fire did not tend to show that he had committed/been charged with/been convicted of any offense other than the theft. And as he was not required to answer that question the fact that arson had occurred did not come out. We do not mean to suggest that the District Attorney's inquiry here was proper. To the contrary, it was a needless interjection of a potentially prejudicial issue. For that reason defense counsel's objection was sustained. However, as that inquiry did not cause prejudice necessitating a mistrial, defense counsel's motion to that end was denied.

Defendant also objects to the testimony of a Commonwealth withness that an insurance company had paid claims associated with the tax shortage, testimony which defendant argues made impermissible references to insurance which unduly influenced the jury as to his guilt.

There is no merit to defendant's objection here, for the initial reference was made in response to defense counsel's own question on cross-examination. Defense counsel did not object to this response and in fact further questioned the witness concerning the insurance payments (see N.T. 122-23, 134, 135). Nor would any objection have been meritorious, for he could not challenge the inadmissible nature of an answer which he himself solicited. *Commonwealth v. Westerfer,* 308 Pa. Super. 474, 454 A.2d 633 (1982). It was only upon the District Attorney's followup questions in this area that defendant objected. It is well established that if a defendant delves into what would otherwise be objectionable testimony on the part of the Commonwealth, then the Commonwealth may probe further into the objectionable area. *Commonwealth v. Stakely,* 234 Pa. Super. 426, 365 A.2d 1298 (1976). Nonetheless we note that upon defendant's objection the court cut off any further inquiry here, finding it to involve a collateral issue.

We also feel it crucial to note that the initial reference to insurance was brought out during defense counsel's attempt to elicit testimony from the witness that no shortage existed because the township had received an amount of money equal to what it was supposed to receive according to the tax bills. The witness's testimony was that the township had received all the monies due but that $80,000-$90,000 of those funds had been paid by the insurance company. Had such an answer not

come out on cross examination fairness would have demanded that the Commonwealth be permitted to bring it out on redirect, for to not so allow would have led the jury to the erroneous conclusion that no shortage existed. Defendant knew where he was going when he initiated this inquiry and cannot now claim prejudice.

Defendant's final post-trial argument challenges the District Attorney's use during closing argument of a blackboard with statistical information concerning the years 1974-1983. Defendant argues that as there was neither evidence nor charges of any improprieties prior to 1981 the District Attorney's comments concerning the years 1974-1980 were improper.[4]

It is axiomatic that in closing arguments the statements made by the prosecutor must be reasonably based upon the evidence produced. *Commonwealth v. Nicholson,* 308 Pa. Super. 370, 454 A. 2d 581 (1982). It is also axiomatic that the prosecutor during closing arguments must be afforded reasonable latitude to present that evidence to the jury. *Commonwealth v. Starks,* 479 Pa. 51, 387 A. 2d 829 (1978). In the present case it was a matter of record that defendant had been the official tax collector for Londonderry Township since the mid-1970s. It was upon that premise that the District Attorney proceeded during closing argument. However, as there was no evidence to suggest any improprieties on the part of defendant prior to 1981 any allusion made by the District Attorney to that effect was specifically corrected by the court during his argument. See N.T. 651. The effect of improper remarks made by a district attorney during closing argument is a matter for the court to evaluate. *Commonwealth v. Gilliard,* 300 Pa. Super. 469, 466 A.2d 951 (1982). Here any prejudice to the defendant was cured by the court's immediate and unequivocal clarification. No prejudice ensued. Defendant's argument here is devoid of merit.

4. Defendant's brief cities comments made by the District Attorney beginning in 1971; however, no such comments appear on the record.

Finally, defendant filed a motion for new trial based on after-discovered evidence. That motion argued that his records were seized by the Commonwealth and that some of them were not returned prior to trial. Among the records was a paid check made out by defendant to the Tax Claim Bureau for $16,512.03 which defendant argued formed the basis of one of the charges in the information filed against him. Defendant argued that had the jury had the opportunity to review this chech along with the rest of defendant's evidence it might have concluded that all funds due were properly paid. A hearing was held on this motion on January 17, 1986. [5]

The legal standard to be applied is well established. A new trial will be awarded on the basis of after discovered evidence only if the evidence in question

> "(1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted."

Commonwealth v. Myer, 340 Pa. Super. 176, 186, 489 A.2d 900, 905 (1985) (quoting *Commonwealth v. Valderrama,* 479 Pa. 500, 505, 388 A.2d 1042, 1045 (1978)).

We have no difficulty in finding that the evidence in question fails to meet the first and fourth prongs of the test. Although the check itself was undeniably in the possession of the Commonwealth and thus unobtainable by defendant, he had both the ability and the opportunity to obtain photocopies of it well in advance of trial. Why he did not do so was argued by both counsel at the hearing, with defense counsel arguing that the bank would not turn over the records and the district attorney arguing that the bank's stance was predicated on the

5. At the hearing--at which defendant did not appear--his counsel stated in argument that defendant "claimed that there were about a hundred other checks in the boxes that were turned over." (N.T. Jan. 17, 1986, hearing at 4). Of course, as defendant never testified to this nor raised it in his motion, we have no evidence of these checks. We are thus limited to consideration of the $16,512.03 check.

"eleventh hour" timing of defendant's request. In any event, because defendant did not attend the hearing we have no actual evidence and testimony as to his actions and thus no basis for finding that he exercised reasonable diligence in attempting to obtain these records.

Even more fatal to defendant's cause here is the fact that the evidence of this check was not of such nature and character as to make likely a different verdict upon the award of a new trial. Defendant was charged with 435 counts of theft by failure to make the required disposition. This check, which did not form a part of those counts (as defendent erroneously alleged in his motion, see paragraph 3; see also N.T. 7-8 of the January 17, 1986, hearing, where defense counsel acknowledges this fact), had no bearing on defendant's guilt of those counts. Defendant's motion for a new trial on this ground is accordingly denied.

For the foregoing reasons we entered the following

ORDER

AND NOW, October 18, 1985, the defendant's post verdict motions are denied and the District Attorney will present him for sentence following a pre-sentence investigation by the Adult Probation Department of Dauphin County.

BY THE COURT:

_____

Warren G. Morgan, Judge

ORDER

AND NOW, March 25, 1986, defendant's motion for new trial based on after-discovered evidence is denied and the District Attorney is directed to present him for sentence.

BY THE COURT:

_____

Warren G. Morgan, Judge

Opinion dated: March 26, 1986

JUDGMENT ORDER OF THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

NO. 11 M.D. ALLOCATUR DOCKET 1987

RUSSELL C. EARHART, SR.,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

Appeal from the Order of the Superior Court of Pennsylvania
entered on December 22, 1986 in the case docketed to
No. 270 Harrisburg, 1986

Order denying the Petition for Allowance of Appeal
dated July 15, 1987

"ORDER: Petition Denied."
Per Curiam.

Supreme Court, U.S.
FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-427

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

RUSSELL C. EARHART, SR.,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. WHETHER THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED ON AVERMENTS IN THE AFFIDAVIT OF PROBABLE CAUSE USED TO OBTAIN THE SEARCH WARRANT?

II. WHETHER THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S EVIDENTIARY RULING ALLOWING EVIDENCE OF APPELLANT'S QUESTIONABLE TAX COLLECTION PRACTICES OTHER THAN THE OFFENSES CHARGED, UNDER WELL-ESTABLISHED EXCEPTIONS TO THE GENERAL EXCLUSION OF EVIDENCE OF OTHER CRIMES?

STATEMENT OF THE CASE

In August 1983, the Commissioners of Dauphin County, Pennsylvania, employed Main Hurdman, a firm of certified public accountants, to audit the tax collection accounts of Petitioner, Russell C. Earhart, Sr., the duly elected tax collector for Londonderry Township in Dauphin County. The county commissioners directed Main Hurdman to check for a pattern of late remittance or nonpayment of taxes by Petitioner.

The auditors sent letters to the taxpayers in Londonderry Township asking if, as of August 31, 1983, their taxes were paid. If taxes were paid, the taxpayer was asked to provide proof and date of payment. The auditors prepared a statistical analysis comparing the payment date with the remittance date by Petitioner. The audit revealed discrepancies between the Dauphin County records and the information the

taxpayers directly provided. For example, the Dauphin County Treasurer's records indicated that payments made by some taxpayers in March or April 1983, were not received from Petitioner until August. Other taxpayers paid taxes in June or July, which were not received at all by the county.

The auditors then advised the county commissioners that, in order to fully investigate the matter, it was necessary to look at school taxes, as well as county collections. Petitioner was collecting county real estate taxes, as well as Lower Dauphin School District real estate and personal taxes.

The school tax audit was similar to that for the county taxes. For every taxpayer listed as having unpaid taxes as of October 28, 1983, a letter was sent requesting confirmation that the taxes were not paid. If the taxes were paid, the

taxpayer was asked to furnish proof of that payment. The auditors prepared a list of taxpayers for whom the Lower Dauphin School District did not receive taxes but who furnished the auditors with proof that they had paid the taxes to Petitioner. This list revealed that Petitioner collected and failed to timely remit taxes totalling $166,349.50. This list was appended to the criminal information filed against Petitioner and became part of the charging document.

At trial, the Commonwealth offered into evidence copies of either the canceled checks or the receipted tax bills for the people on the list. The parties stipulated to the authenticity of these documents and to Petitioner's receipt of the payments represented by these documents. The list covered Lower Dauphin School District taxes, school real estate taxes and school personal taxes. Although a few of the bills dated from 1981, the vast majority were from 1983.

Testimony from the supervisor of tax and census for Lower Dauphin School District revealed that the tax notice advises the taxpayer that bills paid during July and August are subject to a 2% discount. During September and October, the face amount of the tax bill is due. If the bill is not paid until the end of October, a 10% penalty is assessed. Thereafter, the taxpayer has until April 15, in the case of real estate taxes, and until December 31, in the case of personal taxes, to make remittance to the tax collector. Notably, the tax collector is required by law to remit tax receipts to the school district within three working days of receipt.

The payment process for county real estate taxes includes similar staggered payment provisions, with four instead of three payment periods. The tax collector is required by law to turn over receipts to the

county treasurer by the tenth of the month following that of collection. 72 P.S. §5511.25

When Main Hurdman began the audit in September 1983, the tax supervisor provided a computer printout of unpaid personal taxes and a copy of the tax duplicate showing unpaid real estate taxes. Main Hurdman's audit revealed a large number of discrepancies, specifically taxpayers who provided proof of payment to Petitioner, but whose payments were not recorded in the school district records.

The tax supervisor confirmed that tax payments evidenced by the tax bills in the information were never received by the Lower Dauphin School District from Petitioner. Tax reconciliation sheets for the 1983-84 period appeared to indicate that all the anticipated tax revenues which had been billed were received. However, $145,000.00 was received

from Statesman Insurance Company, the bonding agent for Petitioner. An additional $15,000.00 was received after the tax supervisor left his employment with the school district. The review process continued from September of 1983 until trial. During that time, the total was adjusted to $166,349.50.

The director of the Dauphin County Tax Claim Bureau explained that her office received delinquent county real estate taxes as of January 1 and by the first Monday in May with respect to delinquent school taxes. Taxpayers were notified of the delinquency, both as regards to county real estate and school taxes, on July 31 following the year of billing. On occasion, taxpayers who were notified of a delinquency appeared in the tax office with proof of payment to Petitioner. In such cases, Petitioner paid the taxes, including interest and penalty. This

occurred quite often with respect to the 1982-1983 period and, although there are forty tax collectors in the county, this type of thing did not occur with the other thirty-nine.

The Commonwealth produced the bank statements for the Petitioner's tax collector account at Hamilton Bank. On January 31, 1983, the balance was $1,811.58; on February 28, 1983, the account had a deficit balance of $4,231.09; for March 31, 1983, there was a balance of $1,322.79; on April 29, 1983, the balance was $13,550.90; May 31, 1983, the balance was $1,689.28; on June 30, 1983, the balance was $3,399.70; July 29, 1983, the balance was $21,698.99; as of August 31, 1983, the balance was $85,351.24.

In September of 1983, Petitioner made a single payment on the account of collected Dauphin County realty taxes in the amount of $71,199.47. The receipted tax bills which

Petitioner provided with the payment showed that the bulk of the taxes were collected during February and March of that year.

The Dauphin County Controller stated that when Petitioner came to the court house with the September payment, Petitioner admitted sometimes sending a check to an insurance company from his tax collector's account. When Petitioner discovered the "mistake", he would write a check from his insurance account to the tax collector's account. The Controller also noted that the September remittance to the county was subsequent to the initiation of the Main Hurdman audit.

Petitioner testified that since 1973, along with being tax collector, he also operated an insurance and real estate business. He maintained multiple business and personal bank accounts. Petitioner was questioned about these accounts and the timing of his deposits into them.

Petitioner was questioned concerning the check for $71,199.47 which he delivered to the county controller after the audit began in September 1983. He stated that the receipted tax bills which were delivered to the controller along with the check indicated the date on which the monies were received in the tax office. He repeated his earlier testimony that the payments represented by the $71,000.00 had simply been in his office and not deposited until September.

Petitioner was confronted with a number of canceled checks corresponding to tax bills which were included in the bundle delivered to the county in September. In check after check, Petitioner was constrained to admit that the checks were endorsed by him, deposited into his Hamilton account, and cleared the taxpayer's account during February and March of 1983. Petitioner was then confronted with the balances in his

Hamilton account, the tax collector account, as reflected on the bank statements for the months ending January 31 through August 30, 1983. On March 31, the account balance was $1,322.79; on April 29, the balance was $13,550.00; and on May 31, $1,689.00. Petitioner again insisted that the checks which he had received in February and March to cover the $71,000.00 paid to the county in September were in his office until deposited in his bank in September.

Petitioner was reminded of his testimony concerning a loan which he testified had gone for remodeling his properties and for "no other purpose". He was then shown an $8,000.00 deposit made into his tax collector account on May 28, 1982. He was also shown a copy of a check made payable to him from a relative as a loan dated May 24, 1982, for $8,000.00. Petitioner was forced to admit that he had

deposited this $8,000.00 loan into his tax collector's account. He admitted that the money was never removed from the tax collector's account in order to cover remodeling expenses.

Petitioner was then questioned further about his account at Fulton Bank. He again stated that no tax monies went into the Fulton account and that no tax monies would have been paid from that account. He was then shown a check dated May 2, 1982, in the amount of $4,950.00 drawn by him on his Fulton Bank account and deposited into his tax collector account at Hamilton Bank. He was also shown a check drawn on Fulton Bank in the amount of $2,050.00, dated May 20, also deposited into the Hamilton tax collector's account.

PROCEDURAL HISTORY

On May 23, 1984, Chief County Detective for Dauphin County, Kenneth J. F. Barbush, filed a complaint against Petitioner, charging him with Theft by Failure to Make Required Disposition of Funds Received. The complaint, as originally filed, charged that Petitioner, as the duly elected tax collector for Londonderry Township, failed to remit $162,273.53 to the Lower Dauphin School District. The amount represented school taxes collected by Petitioner during the time of August 20, 1981, through October 31, 1983. The charge was comprised of 506 counts representing that number of separate tax bills which, although paid by the tax payer, had not been remitted by Petitioner.

At the preliminary hearing on May 30, 1984, the information was amended to add an additional count, i.e., 507 counts, which increased the amount due to $162,563.87.

At formal arraignment on July 5, 1984, Petitioner pleaded not guilty and requested a jury trial, which was set for September 19, 1984. Petitioner requested and was granted five continuances prior to the commencement of trial on February 14, 1985. Prior to trial, the Commonwealth moved to amend the information to consolidate the number of previous counts to 435, and to amend the total amount of theft to $166,349.50.

Prior to trial, the Petitioner filed a Motion to Suppress Evidence seized as the result of a search warrant served at his place of business on October 7, 1983. The motion alleged, inter alia, that the affidavit failed to set forth probable cause for the search. Following a hearing held immediately before trial, the Court denied Petitioner's motion for suppression.

Trial commenced on February 14, 1985. On February 21, 1985, the jury returned a

verdict of guilty on all 435 counts. Post-trial motions were filed and denied. On April 18, 1986, Petitioner was sentenced to a term of imprisonment of not less than three and one-half (3½) nor more than seven (7) years.

The Superior Court of Pennsylvania affirmed the judgment of sentence on December 22, 1986. On July 15, 1987, the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal.

SUMMARY OF ARGUMENT

The affiant for the search warrant properly presented an audit by an accounting firm as the probable cause to support the issuance of the warrant to search the office of Petitioner, who was the subject of a tax collection investigation. Averments set forth in an application for a warrant may include hearsay, as long as the affiant swears to the veracity of the information. Notably, the Petitioner does not challenge the veracity of the hearsay information used in the probable cause affidavit.

Evidence of Petitioner's practices involving collection of county real estate taxes was necessary to prove his illegal practices regarding collection of school district taxes, which formed the basis of the offenses charged. Petitioner, who collected real estate and school district taxes, engaged in a complex tax siphoning scheme.

Exclusion of evidence regarding the real estate taxes would have made it impossible for the Commonwealth to set the factual predicate for the case. At no point were the uncharged practices concerning real estate collections identified to the jury as crimes. In any event, this evidence would be admissible under well-established exceptions to the rule excluding "other crimes" evidence, since it showed a common scheme, plan or design involving incidents so related to each other that proof of one tended to prove the other.

ARGUMENT

I. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED ON AVERMENTS IN THE AFFIDAVIT OF PROBABLE CAUSE USED TO OBTAIN THE SEARCH WARRANT.

Petitioner, Russell C. Earhart, Sr., challenges the validity of the search warrant served upon his offices on October 7, 1983. Dauphin County Chief Detective Kenneth Barbush applied for the warrant, which was issued by the Honorable William W. Lipsitt of the Court of Common Pleas of Dauphin County, Pennsylvania.

Specifically, Petitioner claims that the warrant application was defective because suppression hearing testimony by the affiant, Detective Barbush, indicated "unawareness of sufficient factual evidence and reasonable inferences that could be drawn therefrom." The application for the warrant included a

four-page summary of an audit report by Main Hurdman, employed by Dauphin County to investigate county real estate tax collections by Petitioner. Detective Barbush was cross-examined at the suppression hearing concerning a number of details contained in the audit of which he did not have firsthand knowledge. He stated, however, that he did swear to the truth of those averments. It is not fatal that the averments set forth in an application for a search warrant are founded upon hearsay, McGray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056 (1967); Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971), or even where probable cause is based on hearsay. Commonwealth v. Kaschik, 235 Pa. Super. 388, 344 A.2d 519 (1975).

While it is true that the veracity of facts establishing probable cause recited in an affidavit can be challenged and examined at a suppression hearing, Commonwealth v.

Hall, 451 Pa. 201, 302 A.2d 342 (1973), Petitioner does not and cannot contend that the affiant falsified the averments in this case. Since the averments in the affidavit are admittedly truthful, the task of the judge issuing the warrant was "simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 776 L.Ed.2d 527 (1983).

The auditor's conclusions contained in the report made part of the affidavit plainly show that Petitioner was holding tax collections for several months before turning them over to the county. This, of course,

was a violation of 72 P.S. §5519.30, and provided probable cause for a warrant to issue.

II. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S EVIDENTIARY RULING ALLOWING EVIDENCE OF APPELLANT'S QUESTIONABLE TAX COLLECTION PRACTICES OTHER THAN THE OFFENSES CHARGED, UNDER WELL-ESTABLISHED EXCEPTIONS TO THE GENERAL EXCLUSION OF EVIDENCE OF OTHER CRIMES.

The Petitioner, Russell C. Earhart, Sr., argues that testimony and documentary evidence concerning real estate tax collections constituted evidence of other crimes not charged in the information and was improperly introduced.

By way of introduction and background, a certified public accountant from Main Hurdman testified that the Dauphin County Commissioners retained her firm initially to conduct an audit into county school district tax collections for Londonderry Township.

The accountant explained that it was not possible to do a complete audit of the tax collector's accounts unless real estate taxes were examined as well. It was only after the school district phase of the audit was undertaken that the missing monies, which formed the basis for the criminal charges, were discovered unremitted. The criminal charges were based upon unremitted school district taxes.

Although there was testimony that Petitioner collected approximately $71,000.00 in county real estate taxes in February and March, which were not remitted to the county until September, there is no testimony in the record from any source which suggested to the jury that the late remittance of real estate taxes was an illegal act.[1] It is true that

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[1] Failure to pay over taxes at the time and place required by the "Local Tax Collection Law", 72 P.S. §5511.25, does constitute a crime. See, 72 P.S. §5511.39.

there was evidence of the tax collector's responsibility to remit county taxes by the 10th of the month following collection and school taxes within three (3) days of collection. However, the possibility of criminal sanctions for failure to make timely remittance was never presented to the jury.

Even if the jury did somehow infer criminal conduct, such evidence was nevertheless admissible under well-recognized exceptions to the rule which generally excludes evidence of "other crimes". Where, for example, such evidence forms part of a chain, a sequence of acts, or becomes part of the history of the event on trial, or was part of the natural development of the facts, it is admissible. Commonwealth v. Brown, 462 Pa. 578, 342 A.2d 84 (1975).

Evidence of another crime is also admissible when it tends to prove "(1) motive; (2) intent; (3) absence of mistake or

accident; (4) a common scheme, plan, or design involving incidents so related to each other that proof of one tends to prove the others; (5) to establish the identity of the person charged with the commission of the crime on trial; or, (6) where the crime was committed to conceal the commission of the crime on trial or to escape its consequences." Commonwealth v. Terrell, 234 Pa. Super. 325, 339 A.2d 112 (1975). Just as the auditor found it necessary to look at the total picture of tax collections, it was necessary for the Commonwealth to introduce evidence concerning county tax collections to show what was happening with respect to the school district taxes, which formed the basis of the criminal charge. The situation with the county taxes established, at least inferentially, an "absence of mistake or accident". This evidence pointedly showed a "common scheme, plan, or design involving

incidents so related to each other" that proof of one tended to prove the other. Moreover, the late payment of county real estate taxes became the modus operandi "to conceal the commission of the crime on trial or escape its consequences." In sum, even if the jury was told directly that the untimely remittance of county taxes was a crime, such other criminal conduct was admissible for any one of the reasons set forth.

The testimony concerning late remittance of county taxes was also relevant as circumstantial evidence to show not only the theft of school district taxes, but also to show the mechanism by which the theft was accomplished. The evidence was deceptively simple on one hand and yet presented an enigmatic labyrinth of numbers on the other. The Commonwealth and defense stipulated that the missing tax payments alleged in the information had indeed been paid by the

individual taxpayers and received by Petitioner. Clifford Brown, who maintained the records of the tax receipts for the school district, testified that the tax bills specified in the information were not paid over by Petitioner.

At first blush, such evidence alone would seem sufficient to prove the Commonwealth's case. On the other hand, the Petitioner's evidence, largely uncontested by the Commonwealth, showed that all of the tax receipts represented by the 435 counts on the information were deposited into Petitioner's tax collector's account. By the same token, all of the monies deposited into this account were dispersed to various taxing authorities.

That which was at first perspicuous suddenly becomes ambiguous. If all of the taxes charged in the information were paid to and received by the Petitioner, deposited to his tax collector's account, and thereafter

disbursed to taxing authorities, where then is the theft? The answer to the apparent riddle is simply that the tax monies Petitioner received for the accounts charged in the information were used to pay tax bills due in an earlier period. The latter were incapable of identification since Petitioner had no records correlating his receipts and disbursements.

In sum, in order to prove the Commonwealth's theory that Petitioner was using after-received taxes to pay previously due taxes, it became necessary to show the jury the total picture with regard to county real estate and school district tax collections.

To this end, the jury heard testimony on the staggered time frames of county and school district tax collections. The jury was shown that not only did school district tax billings always follow county tax

billings by six months, but, of equal importance, taxpayers were given four or five time frames extending for almost a year within which to pay each of the taxes.

The net result of the tax collection system is that the tax collector is not called to account for county real estate tax collections (billed February 1st) until December 15. School district taxes (billed July 1st) are not reconciled by the tax collector until April 15 of the following year. Of course, by April 15, county real estate taxes have again been billed, and, the testimony showed, the majority were paid during the discount period of February and March. Even more lead time exists in the case of county real estate taxes where, although billed February 1, there are five and one-half months (July 1st through December 15th) of school district tax collections which overlap the county tax collection cycle.

The factual significance of this evidence is that it clearly demonstrates the opportunity for any tax collector to avail himself of either county or school district tax collections converting (or, more gratuitously, "borrowing") them for his own use while using subsequent collections from the other to cover the funds siphoned off.

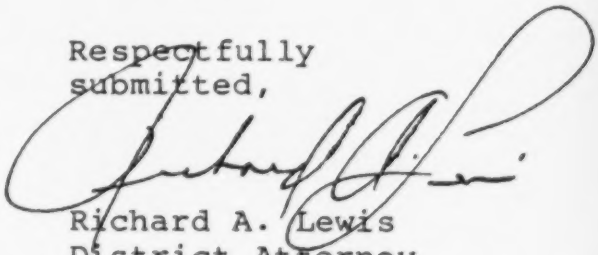
Having thus established the possibility of such conduct, it was incumbent upon the Commonwealth to show that Petitioner was in fact resorting to such machinations to accomplish the theft charged in this case. The evidence showed that, absent an audit, neither the county nor school district taxing authorities had any way to determine - other than through the tax collector's representations - when the monies covering a certain tax bill were actually received by the tax collector.

The evidence as to the dates of receipt of county real estate taxes and of the dates on which such taxes were paid over to the county fully developed the Commonwealth's theory that Petitioner not only had the opportunity to siphon off tax revenues while using after-received taxes to cover their short fall, but also that that was exactly what he was doing. Accordingly, just as the Main Hurdman audit was unable to accomplish its objective without looking at the total tax collection picture of county and school district taxes, the Commonwealth was justified in presenting the entire scope of the audit to the jury so that they could understand the mechanism by which the theft was accomplished.

CONCLUSION

Since neither Petitioner's Fourth nor Sixth Amendment rights were violated, Respondent respectfully asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



Richard A. Lewis
District Attorney